

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

HEATHER SCHRECKENDGUST,

Plaintiff,

v.

No. CIV 07-164 BB/WDS

**BERNALILLO COUNTY SHERIFF
DARREN WHITE and BOARD OF
COUNTY COMMISSIONERS OF THE
COUNTY OF BERNALILLO,**

Defendants.

MEMORANDUM OPINION, ORDER, AND NOTICE OF HEARING

This matter comes before the Court for consideration of Plaintiff's motion for a Rule 16 conference (Doc. 62). The motion raises two issues: (1) whether this Court's recent opinion denied Defendant Darren White's request for qualified immunity; and (2) if so, whether Defendants' appeal of that denial is frivolous. The answer to the first question is yes, as discussed below. With respect to the second question, the Court is required to hold a hearing to decide the issue.

In Defendants' motion for summary judgment, the only ground specifically argued as a basis for granting qualified immunity was Defendants' contention that Plaintiff's claim fails on the merits. Although Defendants mentioned the clearly-established-law requirement, they did not present any argument explaining why the law might not be clearly established. Therefore, by denying summary judgment on the merits of Plaintiff's retaliation claim, the Court implicitly denied Defendant White's request for qualified immunity.

As to the second issue, Plaintiff is correct that the denial of a motion for summary judgment is not normally an appealable order. Plaintiff is also correct that a denial of a request for summary judgment may be an appealable order, under certain circumstances. *See, e.g., Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243 (10th Cir. 2008). Finally, Plaintiff is correct that this Court may certify that an appeal is frivolous if the requirements for a proper qualified-immunity appeal are not met. If such a certification is made, the notice of appeal does not stay proceedings in this Court. *See Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 474 (10th Cir. 2006). However, the Tenth Circuit has stated that such a certification should only be made, if at all, following a hearing. *See id.* Therefore, a hearing is required before this Court can make a decision concerning Plaintiff's request that Defendants' appeal be certified as frivolous.

ORDER AND NOTICE OF HEARING

A Memorandum Opinion having been entered this date, it is hereby ORDERED that Plaintiff's motion for a Rule 16 conference (Doc. 62) be GRANTED in part, insofar as the hearing requested in that motion will held. To the extent the motion requests a certification that Defendants' appeal is frivolous, the motion will be held in abeyance pending the hearing. It is also ORDERED that the parties shall appear **Monday, October 6, 2008 at 2:30 p.m. at the United States District Court, 5th Floor, Bonito Courtroom, Albuquerque, New Mexico**, to resolve the merits of Plaintiff's request.

Dated this 1st day of October, 2008.



BRUCE D. BLACK
United States District Judge